No. 15027

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HERALD PUBLISHING COMPANY OF BELLFLOWER,

Respondent,

and

HERALD PUBLISHING COMPANY OF BELLFLOWER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

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PETITIONER'S OPENING BRIEF.

Statement of Case.

On March 29, 1955, Trial Examiner Herman Marx issued an Intermediate Report, finding that Herald Publishing Company of Bellflower had engaged in and was engaging in unfair labor practices. Thereafter, Herald Publishing Company filed exceptions to the Intermediate Report and a brief in support of the exceptions. On September 16, 1955, the National Labor Relations Board affirmed the decision of the Trial Examiner. Herald

Publishing Company thereafter petitioned the Board for a rehearing, which petition was denied.

On February 3, 1956, the Board filed a Petition to enforce its order with the Ninth Circuit Court of Appeals. On March 12, 1956, Herald Publishing Company filed an Answer to said Petition and a Petition to Set Aside said order.

Questions on Appeal.

Petitioner, Herald Publishing Company of Bellflower, hereinafter called "Herald," raises two issues in support of its position:

(1) The Board improperly asserts its jurisdiction for the reasons that (a) the volume of interstate business done by Herald is so small as to fall within the *de minimus* doctrine; and even if the *de minimus* doctrine is not applicable (b) the interstate activities of Herald are such that they fall within the established policy of the Board to refuse jurisdiction in this type of case. By exercising its jurisdiction the Board abused its discretion. (c) Regardless of the decision on the above two points, Herald's business activities do not affect interstate commerce.

(2) The findings of the Board concerning the alleged unfair labor practices regarding employees London, Ross, Hickey and Farley are not supported by the evidence.

I.

The Board Improperly Asserted Its Jurisdiction Because of the Application of the De Minimus Policy.

Herald contends that its activities do not "affect commerce" within the meaning of Sections 2(6) and (7) of the Act, and further contends that even though some relationship to commerce conceivably might be found, the total effect is *so insubstantial* that the *de minimus* doctrine is applicable.

There is judicial authority in the Ninth Circuit that the *de minimus* doctrine is applicable. The court, in *N. L. R. B. v. Reed,* 206 F. 2d 184 (9th Cir., 1953), stated, "Under the doctrine of *de minimus,* the small out-of-state purchases, alone, would seem to be insufficient to justify the Board in assuming jurisdiction of this case."

It was proved by the General Counsel that Herald owns nine separate community papers, all located in the southern part of Los Angeles County, California. All of the papers are published in two printing plants both of which are located in the City of Compton, California. [Tr. p. 149.] This evidence was not contradicted. Herald sends no copies of its newspapers to any points outside of the State of California. Circulation is confined to Los Angeles County communities. [Tr. p. 24.] No evidence was offered to the effect that Herald purchased newsprint or other materials from outside of the state. The newspapers are semi-weekly publications, published Thursday and Sunday. Nine editions appear Thursday and seven editions on Sunday. [Tr. p. 23.] Circulation of the Thursday paper is 142,000. [Tr. p. 175.] Sunday

circulation is between 130,000 and 140,000. [Tr. p. 210.] The papers publish local news of interest to the particular community. [Tr. p. 177.] Revenue is collected from only 30% to 40% of the circulation delivered by the newsboys. [Tr. p. 211.] On other papers, put on newsstands, virtually nothing is collected. [Tr. p. 212.]

The Trial Examiner relied on two main points in asserting that the Herald's activities "affect commerce":

(1) That Respondent advertises nationally-sold products;

(2) That Respondent subscribes to an interstate news service.

National Advertising.

There are two facets to this problem: first, are advertisements placed by local advertising agencies, or by out-of-state agencies; and second, is the advertising of "nationally sold" products, national advertising?

1. Who Places the Advertisements?

The evidence shows that none of the Herald's revenue is obtained from advertising agencies located outside of the State of California, or from local agencies with branch offices outside of the state. Witness Hartwell was asked what the Respondent considered to be "national advertising." His reply was:

> "For the most part, it is that advertising that our salesmen are able to dig up among local accounts that have quotas of advertising funds from merchandise that they have purchased, and try to persuade the local merchant to spend his money in our newspaper rather than in bill-boards, direct mail service or other medium of advertising." [Tr. p. 151.]

Auto Ads All Placed by Local Agencies.

Despite the statement by the Trial Examiner that some of the auto ads were financed by funds allotted to the local dealers by the manufacturer, there is no evidence to support this statement. [Tr. p. 26, Fn. 4.]

Certainly the statement of Brewer, relied on by the Trial Examiner [Tr. p. 42], to the effect that the agencies "perhaps" act on behalf of the manufacturer, is far too speculative to have any probative value on the issue of whether the manufacturer pays for a part of the advertising placed by local dealers. The testimony shows that auto ads were placed by local dealers [Tr. p. 363], and through local advertising agencies; the dealers must approve the ads sent by the agency. [Tr. pp. 363-365.] There is no evidence that the advertising agencies which place these ads do business outside of the State of California.

Witness Hartwell testified that Herald picked up mats and orders from local dealers.

> "We have salesmen who call on all the automobile dealers and persuade them to spend as much of their profit as they can in the local papers." [Tr. p. 160.]

Witness Brewer testified:

> "The dealers themselves authorize the ads, they O. K. the ads. It is their money. *They pay for the ads.* They may come from an agency, so we consider that as local advertising regardless of whether we know or don't know where the mats come from." [Tr. p. 363.] (Emphasis added.)

Brewer further testified that some of the mats came directly from local advertising agencies [Tr. p. 363], but those ads are first authorized by the local dealer. [Tr. p. 364.] Brewer also testified that there has never

been a case where the local agency sent in a mat and after receiving the mat Herald sent display salesmen to solicit ads from the local dealer, with the representation that Herald had a mat for a good ad. [Tr. pp. 364-365.] The evidence thus shows that the ads are placed by either the local automobile dealer, or by the local advertising agency. Where the agency places the ad, it must be approved by the dealer. There is no evidence that any of the agencies do business outside of the State of California, or that the local agencies have branches outside of the State of California.

Brewer testified that Herald does not expend money and effort in getting manufacturers and buyers of various advertising agencies all over the country, as is the case with larger papers.

Is Amount of Advertising of National Products Sufficient to Affect Interstate Commerce?

Although the Trial Examiner states that Brewer testified that a lot of money was spent for automobile advertising [Tr. p. 42], there is nothing in the record to indicate the amount. The books of Herald would show that of a gross revenue of $1,714,377.68, for the year 1954, only $22,257.86, or less than 1.3% of the total revenue, was received from automobile advertising.

2. Nationally-Sold Products.

It is Herald's contention that the mere advertising of nationally-sold products does not affect interstate commerce. The true test for determining national advertising should be, where does the ad come from? If a paper with a circulation of 142,000 has labor difficulties and must close down the newspaper for a period of time, the effect on nationally-sold products will be negligible. How-

ever, if that same paper purchases advertisements from out-of-state agencies, and ceases to make such purchases, there will be a direct effect on interstate commerce.

In addition, the amount of advertisements of national products was so slight as to fall within the *de minimus* doctrine.

For example, Hartwell testified on the advertisements placed in the Herald American of September 16, 1954. [Tr. p. 155.] A "Lucky Lager" ad was 6 columns by 17 inches, that is 102 inches of 168 inches on the page. [Tr. pp. 155-156.] Only three Lucky Lager ads appeared in all of the papers between Spring and October, 1954.

From the transcript, it is apparent that no Hills Brothers advertisement appeared in that particular issue. But there was testimony that there was only one such ad placed in July and one other ad in October of 1954, and that the ad ran for only one day in all nine zones. [Tr. p. 168.]

There was a Luzianne coffee ad of thirty-three inches, or slightly less than 1/6 of a page. [Tr. p. 155.]

There was a Norway sardine ad, two columns, four inches long, or a total of eight inches. The paper consists of 40 pages, 320 columns. [Tr. p. 157.]

There was an R. C. A. and a "Playtex" brassiere ad. [Tr. p. 157.] These ads were placed by local stores and charged to the account of the particular store. [Tr. p. 158.]

Brewer, when asked who paid for the "Playtex" ad replied, "As far as we are concerned, the funds are supplied by Lee's as we bill them and they pay it." [Tr. p. 371.] The evidence further indicates that all ads for the above products were placed by advertising agencies

located in the State of California. [Tr. pp. 166, 170.] As to the "Playtex" ad, Brewer testified:

> "We do not carry the account 'Playtex' through any agency or through any national account on it. We have nothing to do with the national account on it. It is handled at the local level." [Tr. p. 370.]

None of Herald's revenue is derived from any National advertising group within the California Newspapers Publishing Association. [Tr. p. 375.]

U. P. Letters.

The Trial Examiner reached the conclusion that even if there was no "national advertising," Herald's activities fall within the purview of the Board's jurisdiction on account of their use of U. P. newsletters. The Trial Examiner stated on page 4, lines 10 and 11 of his Report that Respondent "subscribes to the news letter in order to retain some right (*not otherwise elaborated in the record.*" (Italics ours.) On page 176 of the Transcript, Witness Smith specifically stated that Herald subscribes to the newsletters in order to retain the right to subscribe to the U. P. wire service if it desired to do so in the future. If Herald did not subscribe to the letter, it would lose this right to later subscribe to the wire service. [Tr. p. 177.]

The Trial Examiner also stated that "the 'Garden & Home Magazine' Supplement to the issue of September 12, 1954, contains a substantial number of items dealing with events that occurred, or places that are located, outside the State of California." [Tr. p. 27.] The evidence showed that there were only three such items in this particular issue. [Tr. p. 180.] The only other evidence of the use of a so-called U. P. release was an article

in the October 21, 1954 Paramount-Hollydale edition. [Tr. p. 181.] Note that there were no U. P. releases in the regular editions of the newspaper, that the only use made of the U. P. letter was in the Sunday magazine section, and that only 4 articles from two editions were introduced into evidence.

Herald excepts to the conclusion of the Trial Examiner, affirmed by the Board, that "such a subscription (U. P. newsletters) is clearly analogous to 'membership in interstate news services.'" [Tr. p. 46.] There is nothing in the decided cases to support such a conclusion. It is clear that the receipt of one weekly newsletter will not have the same effect upon interstate commerce that the constant use of a wire service will. The uncontradicted evidence shows that the payment for the newsletter was "a small amount," and the only reason that Respondent subscribed to the letter was to retain its right to be able to use the U. P. wire service at a future date if it is so desired. [Tr. p. 177.]

Law.

Jurisdictional standards for newspapers were established by the case of *Press, Inc.,* 91 N. L. R. B. 1360 (1950). In 1954 a supposedly new standard for newspapers was established by the case of *Daily Press, Inc.,* 110 N. L. R. B. No. 95 (1954). The Trial Examiner held that by applying the standard set forth in the *Daily Press* case, Herald is within the jurisdiction of the Board. On page 8, line 26, of the Intermediate Report, the Trial Examiner quotes from the *Daily Press* decision as follows:" '. . . that in future cases the Board will assert jurisdiction over newspaper companies which hold membership in *or* subscribe to interstate news, services, *or*

publish nationally syndicated features, *or* advertise nationally sold products, if the gross value of the business of the particular enterprise involved amounts to $500,000 or more per annum.' (Emphasis supplied.) Several features of the quoted language may be noted. First, apart from the monetary standard, the other criteria are stated in the disjunctive. Thus, . . . a newspaper . . . meets the standards if it advertises 'nationally sold products' whether or not it also holds membership in or subscribes to interstate news services, or publishes 'nationally syndicated features.'" It is submitted that this has always been the law, even before the decision in the *Daily Press* case. For example, in the *Daily Press* decision the Board stated: "Among the (jurisdictional) standards adopted in 1950 was the so-called 'newspaper' standard. Pursuant to this standard, the Board asserted jurisdiction over all newspaper companies which hold membership in *or* subscribe to interstate news services, *or* publish nationally syndicated features *or* advertise nationally sold products, irrespective of the size of the particular enterprise involved or the possible effect upon interstate commerce." (Emphasis added.) Note that in this quotation, the conditions were stated in the disjunctive, just as they were in announcing the "new" standards.

The Trial Examiner states in the Intermediate Report [Tr. p. 38], "Second, the assertion of jurisdiction is not conditioned upon any dollar volume of advertising income or of payments for nationally syndicated features, nor upon the regularity or frequency with which such features are used." It is submitted that this is an erroneous interpretation of the *Daily Press* decision. In effect, the Trial Examiner is stating that so long as the gross income of a newspaper is in excess of $500,000

the Board will have jurisdiction over that newspaper. This interpretation of the *Daily Press* decision is not logical.

The purpose of the *Daily Press* decision was not to extend the jurisdiction of the Board, but rather to limit it. Stated in the *Daily Press* decision is the following:

> "It is our opinion that the jurisdictional standards established by the Press, Incorporated decision should be revised so that the Board's long-established policy of limiting the exercise of its jurisdiction to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce can be better attained.
>
> "We have, therefore, determined that in future cases, the Board will assert jurisdiction over newspaper companies which hold membership in or subscribe to interstate news services, or publish Nationally sold products, *if the gross value of business of the particular enterprise involved amounts to $500,000 or more per annum.*" (Emphasis added.)

It is our contention that the decision in the *Daily Press* case overruled prior cases only to the extent that jurisdiction was asserted where the gross value was less than $500,000. It did not overrule the interpretation of prior cases that the Board would assert jurisdiction in cases where newspaper companies held membership in or subscribe to interstate news services, or published nationally-sold products, but only where there was a *substantial* amount of activity along these lines. The mere fact that a newspaper has a gross income of $500,000 or more does not mean that it will have an impact on interstate commerce. Nearly every newspaper advertises *some* nationally-sold product, but this does not mean that the Board

will assert jurisdiction merely because the company ran one advertisement of a nationally-sold product. Suppose that a newspaper with a gross revenue of $500,000 runs one advertisement of a Ford automobile, in one issue, for which it is paid $50.00. It does not subscribe to a wire service, purchase materials from out-of-state, or have any other "national advertising." It seems ridiculous to say that the *Daily Press* decision intended that the Board take jurisdiction in such a case.

There are situations where the Board has asserted that dollar amounts shall determine whether a concern is engaged in interstate commerce. Just to cite a few examples, *Matter of Stanislaus Implement and Hardware Co., Ltd.,* 91 N. L. R. B. 618 ($25,000 shipment test); *Matter of Dorn's House of Miracles, Inc.,* 91 N. L. R. B. 632 (an indirect inflow of $1,000,000 of goods or services annually); *Matter of Federal Dairy, Inc.,* 91 N. L. R. B. 638 (direct inflow of $500,000); *Matter of Hollow Tree Lumber Co.,* 91 N. L. R. B. 635 (furnishing goods or services valued at $50,000 per annum to interstate enterprises).

In each of these cases the monetary standard was based on how much *interstate busines was done,* or how much in the way of goods or services the company *supplied to or received from interstate commerce.* In no case was jurisdiction based merely upon the *gross revenue* of the company without any consideration of the amount of, or the effect of the company's activities upon interstate commerce. This observation bears out Herald's position that the *Daily Press* statement of the $500,000 figure was a limitation on the Board's jurisdiction, and that in addition to having $500,000 of gross revenue the *other* elements mentioned below must also be established.

The Board decisions have interpreted the phrase, "membership in or subscribe to interstate news services, or publish nationally sold products, to mean that these activities must be substantial in relation to the remainder of a newspaper's business. The *Daily Press* case did not change this interpretation but merely added an additional requirement; that the newspaper must also gross $500,000 per year. The *Daily Press* case therefore imposed a more rigid standard for the Board. This interpretation is supported by the opinion in the case. In the dissent of the *Daily Press* case there appears this language:

> "It should also be noted that, in view of the fact that in 1952 over 275,000 employees worked for newspapers in the United States, a not inconsequential portion of the nation's working force is affected by this *limitation* upon the Board's jurisdiction." (Emphasis added.)

The Board restricted its jurisdiction for future actions by stating that in addition to the paper having an impact on interstate commerce it must also have a gross income of $500,000 annually before the Board will take jurisdiction.

Therefore, the cases which have interpreted the term "impact on interstate commerce," which were decided before the *Daily Press* case, will still be applicable.

In Matter of Weiss, 92 N. L. R. B. 993 (1950), the newspapers were shopping guides. They contained some advertising or nationally known products and also ads of public utility corporations. They did not make use of a national news service. During the previous 12 month period, the employer bought the following items: (a) paper, ink, mats and type, and other supplies in the amount of $41,000, 75% of which came from points

outside of the state (N. J.); and (b) machinery in excess of $2,500 in value, all of which came from out of state. The employer received during the same period between $50,000 and $55,000 for printing 7 newspapers, with a circulation of 39,400, all within the state of N. J. The employer also received $64,000 for printing circulars, 10% of which went outside of the state. The Board held that although the operations were not unrelated to commerce, it would not effectuate Board policies to assert jurisdiction in the case.

In *Mutual Newspaper Publishing Co.,* 107 N. L. R. B. 127 (1954), the employer purchased newsprint of a value of $18,000 per annum, directly from outside of the state of California. It purchased a weekly mail service from the United Press office in Sacramento, and from the A. P. and Commercial Newspapers of Chicago. Together these services cost the employer about $400 a year. Fourteen of the Daily Journal's subscribers were located out of state. The employer sells advertising and other services of firms engaged in interstate commerce, of the value of $30,000 per year. The employer supplies U. P. with tips on local stories involving the legal profession, which U. P. may or may not follow up. For this the U. P. paid the employer $50 per week. The Board declined to assert jurisdiction, holding that the empoyer was not an instrumentality of interstate commerce because less than 2% of the total news content of the employer's daily newspapers consisted of material supplied it by the two interstate mail services. The employer received only $210 a year from out of state subscribers and only $50 a week from the U. P.

Wave Publishing Co., 106 N. L. R. B. 1064. The employer in this case printed and published 6 community

newspapers, with a total circulation of about 111,000. In addition, it did a small amount of commercial printing. Four of the papers (circulation 81,000) were published twice weekly, the others were published once a week. The paper had no out-of-state subscribers and was not a member of a wire service. During the prior 12 month period, the company bought supplies in the amount of $225,000, 70% of which came from out-of-state. The Company paid $3,000 annually for syndicated cartoons, columns and advertising mat services. Its gross income was $875,000 almost all of which was from advertising. About $10,000 of its ads were placed by national advertising agencies, located out of the state. Another $10,000 worth represented locally placed ads of nationally sold products. National chain store ads accounted for an additional $78,000 of income. The bulk of the company's income represented ads of local and national products placed by local merchants, reimbursed in part, by the national manufacturer. The Board held that the company engaged in interstate commerce within the meaning of the Act but refused to assert jurisdiction, on the ground that the policies of the Board would not thereby be effectuated.

The Trial Examiner in his Intermediate Report asserts that the facts in the *Wave* case afford a stronger basis for asserting jurisdiction than do the facts in the instant case. [Tr. p. 37.] But the Trial Examiner states that because Herald in the instant case subscribes to the U. P. newsletters, the *Wave* case is distinguishable. [Tr. p. 37.] This distinction is not valid. In the cases cited above, no one factor was considered to be determinative of the issue of jurisdiction, but rather the Board examined all of the facts of the particular case in order to

determine whether the newspaper was engaged in interstate commerce, and if it was whether the policies of the Board would be furthered by asserting its jurisdiction.

In the instant case the papers are all community papers, and are all published in California. Unlike the *Mutual* and *Weiss* cases, none of Herald's newspapers were sent out of the state. Unlike the *Weiss, Wave* and *Mutual* cases, none of Herald's machinery or other supplies and materials were purchased from outside of the state of California. Less than 1.3% of Herald's advertising was from nationally sold products (automobiles), whereas in the *Wave* case about 11% of the gross income was from the advertising of nationally sold products. The mere fact that Herald received a weekly news letter from the U. P. does not bring the instant case outside of the rule announced in the *Wave* case. Herald paid "a small amount" for the letter merely to retain its right to be able to use the U. P. wire service at a future date. [Tr. p. 177.] The letter was received only once a week, and the only actual use made of the letter, which the General Counsel proved, was three articles in one issue of the Sunday magazine section, and one other article in another Sunday magazine issue. These articles were merely "filler material." There is absolutely no evidence that the daily papers, or even the Sunday papers, except in the magazine section, used any U. P. material. This is certainly a weaker case than the *Mutual* case where the employer purchased three weekly letters from three separate interstate services, and in addition was paid by the U. P. for supplying that service with tips for its other subscribers.

Herald contends that the Board by exercising its jurisdiction in this matter abused its discretion and action in violation of its own rulings.

II.

The Activities of Herald Did Not in Any Event Affect Interstate Commerce.

As was stated in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937),

> "This definition (interstate commerce) is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."

Herald contends, that athough many courts have stated that the dollar volume of interstate business will not determine the issue of whether the *de minimus* doctrine will apply, it is Herald's contention that where the dollar volume if interstate activities is as slight as it is in the instant case, it will not affect interstate commerce. A strike at Herald's plant would have little or no effect upon interstate commerce.

It is therefore Herald's contention that the Board erred in asserting its jurisdiction in this matter.

III.

Contrary to the Findings and Conclusions of the Trial Examiner and the Board, Herald Did Not Engage in Any Unfair Labor Practices or Discharge Any Employee Because of Union Activities.

A. Surveillance of Sheets, by Murray.

The finding of the Trial Examiner that Murray did not accord a literal meaning to the remark of Sheets that Sheets had invited Ross to his home to "pitch horseshoes," seems strained. Even if it is true that Murray did not accord a literal interpretation to this remark, it is the position of Herald that the act of Murray of visiting Sheets' home is not a surveillance within the meaning of the Act. First note that no union meeting was actually in progress, nor had a meeting been called by the employees. [Tr. p. 61.] There is no doubt that actual surveillance of a union meeting is a violation of the Act. There are also cases which hold that where the representative of an employer visits a saloon or drug store where employees gather and meet *informally* to discuss union activities, that there is a violation of the Act. (*N. L. R. B. v. Clark Bros. Co.,* 163 F. 2d 373 (2d Cir., 1947); *N. L. R. B. v. Collins & Aikman Corp.,* 146 F. 2d 454 (4th Cir., 1944).) However, no reported decision has gone so far as to hold that an attempted surveillance of a pace where there was no meeting in progress or where there was no evidence that there had ever been either an informal or a formal meeting of employees to discuss union activities, is a violation of the Act. Added to that is the questionability of whether Murray even thought that a union meeting had been called at Sheets' house.

B. Credibility of Smith and Butler.

The Trial Examiner concluded that Butler and Smith were not forthright witnesses. [Tr. p. 77.] One of the bases for this conclusion was that they were evasive not responsive. It is submitted that this is merely their method of answering questions and that a normally conscientious witness might appear to be evasive. Also the events in question occurred months before the hearing, and an honest witness who is honestly attempting to recall events which took place many months before might appear to be evasive in that he is trying to recall the true facts.

C. London's Discharge.

The Respondent excepts to the conclusion that the evidence does not establish that London neglected his duties for organizational work. [Tr. p. 89, fn. 29.]

The Respondent contends that the evidence established that London was discharged for neglecting his duties. On page 408 of the Transcript there is evidence to the effect that London used the company telephone during business hours to engage in union organizational activities. The Trial Examiner stated that there was nothing to indicate that there was a company rule which prohibited London from using the company telephone for personal affairs. However, the very fact that he did use the telephone during business hours indicates that he was not attending to his duties.

There is testimony that London was not discharged because of his union activities but rather because he took Thursday afternoons off. There is testimony that he was warned by Butler of this practice a month or two before he was actually discharged. [Tr. p. 256.]

The conclusion that London's account of the conversation between Smith and himself is essentially undisputed is not accurate. [Tr. p. 86.] The essence of the conversation, according to London, is that he was discharged for union activities. However, Smith denied that London was discharged for union activities, hence Smith disputes the inference raised by London's version of the conversation.

D. Butler's Interrogation of Ross.

The Respondent excepts to the conclusion of the Trial Examiner that Butler's interrogation of Ross, asking him whether he had joined the Guild, was a violation of the Act. The cases hold that such a question is not a violation of the Act. The latest expression of this concept was stated in *N. L. R. B. v. McCatron,* ..... F. 2d ..... (9th Cir., Oct. 13, 1954), wherein the court stated that an employer's interrogation *re* union activity does not in and of itself violate the Act; to violate the Act, the interrogation must either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce. In the *McCatron* case the Court held that the Board erred in finding that the employer violated the Act by interrogating employees regarding union activity, there being no threat in the interrogation. In the instant case, there is no shred of evidence that there was any kind of a threat, express or implied, in Butler's interrogation of Ross.

E. Hickey's and Farley's Discharge.

Respondent contends that there is sufficient evidence to show that the discharge of Hickey was for a lawful purpose. In her application for California Unemploy-

ment Insurance benefits, Hickey stated as the reason for her discharge was an economy cut-back. [Tr. p. 118.] This of course is contrary to the reason which she gave at the Hearing. It seems that there is more likelihood that she would be telling the truth at a time when she had no reason to hide or distort the true facts. In other words, the statement given to the Unemployment Bureau is more likely to be the true version because at that time she had no self-interest in establishing any reason for the discharge.

The Trial Examiner stated that Hickey and Farley were discharged because they wore union buttons, yet another employee, Fitzgerald wore a button in the presence of 2 of the supervisory employees, and there is no evidence that she too was discharged. This would bear out the version given by Respondent's witnesses that Farley and Hickey were not discharged because of union activities. [Tr. p. 120.]

It is therefore, Herald's contention that the order of the Board should be reversed on the grounds that (1) the Board had no jurisdiction over Herald, and (2) the evidence does not support the conclusion that Herald committed any acts in violation of the Act.

Respectfully submitted,

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